Workplace Examinations & MSHA’s New Rule

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What’s Been Happening?
Timeline of Events:

• July 22, 2015 – MSHA Issues Program Policy Letter incorporating Task Training and “Best Practices”
• June 8, 2016 – MSHA Issues Proposed Rule
• July 12, 2016 – Review Commission Sunbelt Rental decision
• January 23, 2017 – MSHA published Final Rule (sent to FR 1/17/17)
• March 17, 2017 – NSSGA, NMA, PCA et al. file Petition for Review in 11th Cir. Court of Appeals challenging rule (decision pending)
• TRUMP ADMINISTRATION: Rule’s implementation date extended until June 2, 2018 – rule reopened for additional comment on time of examination, documentation requirements …
Overview – 30 CFR 56/57.18002

- Current language of the standard is unchanged from August 1979, when MESA workplace exam standard became a mandatory standard (no longer advisory)

- MSHA has determined that workplace exams are a critical element to any effective Accident Prevention Program

- Since 2000, nearly 14,000 citations/orders issued to M/NM operators related to workplace exams, including more than 80 issued for fatal and non-fatal accidents

- MSHA’s concerns over inadequate Workplace Exams leads to the issuance of a new Program Policy Letter on July 22, 2015, which effectively added heightened training requirements for the “competent person”
OVERVIEW – 30 CFR 56/57.18002 (cont’d)

- 2015 PPL targets task training of miner examiners on workplace exams
- PPL adds that if multiple safety hazards are not identified by the examiner, this may indicate inadequate or absent task training (or training plan)
  - This can lead to double (or triple) dipping on citation issuance!
- Part 46 task training is also one of MSHA’s “Rules to Live By” and can result in special assessments = higher penalties!
- Part 46 and Part 48 violations for missing training result in Sec. 104(g) orders, withdrawing miner until training is complete
  - Sec. 104(g) orders are also an elevated action for Pattern of Violations (POV) purposes and high negligence classifications can result in Section 110 prosecutions
Current Duty under 56/57.18002

- A COMPETENT PERSON designated by the operator shall examine each WORKING PLACE at least once each shift for conditions which may adversely affect safety or health. The operator shall promptly initiate corrective action to correct.
  - The examiner – even if hourly employee - will be considered an “agent of management” for Sec. 110(c) purposes – Nelson Quarries case
  - MSHA has backed away from this in 2017 final rule
- A RECORD that examinations were conducted shall be kept for a year and made available for review by MSHA upon request.
- Conditions which may present an IMMINENT DANGER which are noted by the examiner shall be brought to the immediate attention of the operator, who shall withdraw all persons from the affected area until the danger is abated.
  - Persons who are involved with abatement, under Sec. 104(c) of Mine Act, are permitted within the area
“Competent Person”

- Defined in 30 CFR 56/57.2 as “a person having abilities and experience that fully qualify him to perform the duty to which he is assigned”

- MSHA Policy adds: “Examiner should be able to recognize hazards and adverse conditions that are known by the operator to be present in a work area or that are predictable to someone familiar with the mining industry.”

- MSHA “Best Practice”: For a foreman or supervisor to conduct the exam; an experienced non-supervisory miner may also be “competent” but inexperienced miners should not conduct the workplace exam.
“Working Place”

- Defined in 30 CFR 56/57.2 as: “Any place in or about a mine where work is being performed”
- As used in 56/57.18002, MSHA applies the phrase to all locations at a mine site where miners work in the extraction or milling processes.
- This includes area where work is infrequently performed, such as areas accessed during maintenance periods or clean-up.
- ALL such working places must be examined by a competent person at least once per shift.
“Imminent Danger”

107(a) Imminent Danger

- "Imminent danger" is defined in the Act as
  
  "the existence of any condition or practice in a mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." The two important elements of an imminent danger are:
  
  - the existence of a condition or practice which could reasonably be expected to cause death or serious physical harm; and
  
  - the imminence of the danger is such that it may cause death or physical harm before it can be abated.

-- MSHA’s Program Policy Manual
What needs to be inspected???

- Will be unique to each mine, but should cover:
  - Highwalls and ground conditions (also a separate duty under standard at 30 CFR 56/57.3401)
  - Roadways
  - Dump points
  - Ramps
  - Screens, crushers and conveyors
  - Control towers, MCC and scale house
  - Shops
  - Any other areas where workers work or travel (travelways, walkways, floors with tripping hazards)
  - Any other hazardous conditions
Ground Control Inspections

§57.3401 Examination of ground conditions.

“Persons experienced in examining and testing for loose ground shall be designated by the mine operator. Appropriate supervisors or other designated persons shall examine and, where applicable, test ground conditions in areas where work is to be performed, prior to work commencing, after blasting, and as ground conditions warrant during the work shift. Underground haulageways and travelways and surface area highwalls and banks adjoining travelways shall be examined weekly or more often if changing ground conditions warrant.”
Old Rule: Workplace Exam Records

- The Standard simply required that there be a record that the exam was conducted on each shift and the name of examiner
  - No specific content requirement but records must be kept 12 months
- Detailed information on similar hazardous conditions may document ongoing violation & failure to abate the previously identified hazardous conditions.
  - Can lead to issuance of [Sec. 104(d) citations](#) (up to $254,530) against mine operator
  - Can lead to possible personal [Sec. 110(c) penalties](#) (nearly $70,000) against the examiner and any other “agent of management” who had knowledge of the alleged violative condition and failed to promptly implement corrective action
If Hazards are Found …

Barricades & Warnings – 56/57.20011 – The standard states:

- “Areas where health or safety hazards exist that are not immediately obvious to employees shall be barricaded or warning signs shall be posted at all approaches. Warning signs shall be readily visible, legible, and display the nature of the hazard and any protective action required.”

- Don’t get caught without needed barricades or warning signs!

- Extended use of barricades or “caution” tape may be viewed by MSHA as allowing condition to exist without abatement = knowledge = aggravated conduct!

- Barricades are a RTLB (Rules To Live By) – allows more aggressive enforcement efforts
MSHA’s Program Policy Manual (PPM) on Workplace Exams

- MSHA’s Program Policy Manual (PPM) states:
  “Although presence of hazards covered by other standards may indicate failure to comply with this standard, MSHA does not intend to cite 56/57.18002 automatically when the agency finds an imminent danger or a violation of another standard.”

- PPM had allowed the operator to discard records after MSHA completes its next regular inspection of the mine, IF the operator also certifies that the examinations have been made for the preceding 12 months (person certifying is subject to criminal prosecution if false certification).

  - Under 2015 PPL and new rule, MSHA requires the operator to maintain records for a period of 12 months, and made available to the inspector.
“MSHA intends to allow operators considerable flexibility in complying with this provision [examination records] in order to minimize the paperwork burden. Records of examinations may be entered on this computer data-bases or documents already in use, such as production sheets, logs, charts, time cards, or other format that is more convenient for mine operators.”

**BEWARE:** Using multi-purpose forms for exam records gives MSHA a LOT more information than it is entitled to under the standard ... information that can be used against you in a court of law!

PURPOSE of PPL: To clarify the EXISTING REQUIREMENTS in the standard -- that examination of working places includes:

- that the operator examine each working place at least once each shift for conditions which adversely affect safety or health (NOTHING NEW), and
- that the examination be conducted by a competent person, and (NOTHING NEW),
- that a record of the exam be maintained and made available to MSHA – records must be retained for rolling 12-month period (NOTHING NEW),
But MSHA PPL also added …

- **TASK TRAINING** of competent person MAY BE INADEQUATE, if multiple safety hazards are not identified during exams…

- The examiner must be a TRAINED, competent person

- Miner’s Task Training must now include training on how to perform workplace examinations, or risk citation

- The operator’s TRAINING PLAN must detail how the task training will be conducted, or risk citation
MSHA PPL also says...

- **BEST PRACTICES SUGGESTED IN THE PPL:**
  - Assign Foreman or Supervisor to conduct exams
  - Document a description of any condition found by the examiner “that may affect safety or health” in the exam record, and
  - ALERT OTHERS at the mine of conditions found by the examiner that may reoccur or otherwise affect other miners...
Recordkeeping: MSHA PPL

- MSHA takes position that a “meaningful” record should contain the following:
  1. the date the examination was made;
  2. the examiner’s name; and
  3. the working places examined

- MSHA adds: it is a best practice to also include a description of such conditions in the examination record to facilitate correction and to alert others at the mine of conditions that may recur or in other ways affect them.

- Evidence that a previous exam was not conducted or that corrective action was not promptly initiated constitutes a violation of 56/57.18002(a) –
  - Evidence may include information which demonstrates that safety or health hazards existed prior to the shift on which they were found.
“A competent person designated by the operator shall examine each working place at least once each shift, before miners begin work in that place, for conditions that adversely affect safety or health.” (NEW)

Definitions of “competent person” and “working place” remain same per 56/57.2 (current)

Examination of each working place at least once each shift (current) but before miners begin work in an area (NEW)

The examiner/competent person’s name, date and location of examination record must be included (NEW)

The examination record must include a description of any conditions that may adversely affect miners S&H (NEW)
Final Rule (cont.) . . .

- The examination record must include the DATE of the corrective action (new)
- The Operator must promptly notify miners of any adverse conditions found (NEW) and promptly initiate corrective action
- The examination record must be made available to miners and their representatives (new)
- Withdrawal of miners if an imminent danger is found and notification of Operator (current)
- Examination record maintained for a period of 1 year (current) and made available to MSHA and to rep of miners (NEW)
FINAL RULE – SUMMARY

• Competent person is still looking for - “conditions that adversely affect safety or health” but the new requirements include:
  • Identifying hazards before work begins
  • Examiner must communicate hazards to miners
  • Record made before the end of the shift
  • Record must include a description of each condition found during the examination
  • Record must include the date of the corrective action
MSHA’s Rationale for Rule

- MSHA states that mine operations are dynamic and conditions can change rapidly and without warning.
- Prevention against hazards is the primary responsibility of mine operators with the assistance of miners (The Mine Act).
- Compliance with safety and health standards and adoption of safe work practices provides a substantial measure of protection against hazards.
- MSHA has determined that effective accident prevention includes an effective examination of working places – ineffective examinations have resulted in more accidents.
- Summary of compliance costs of new rule: $34.5 million/yr
- NO COST BENEFIT IDENTIFIED BY MSHA
THE BACKGROUND:

- MSHA issued citations to Sunbelt Rentals, Inc. and several of its contractors, for violations of 56.18002(a); contests were filed.

- The Secretary of Labor argued that the Workplace Exam standard required the operator to perform an ADEQUATE EXAMINATION.

- In underlying decision that was reviewed, Judge McCarthy held that the plain language of 56.18002(a) did not include an ‘adequacy’ requirement … if MSHA wants to impose an adequacy requirement, MSHA may revise the standard to give the industry fair notice.
The Review Commission Vacated the Judge’s Decision

- The Secretary of Labor/MSHA appealed the Judge’s decision finding NO adequacy requirement
- On July 12, 2016, the Review Commission vacated Judge McCarthy’s decision, and
- Commission held the examination must be “adequate”
- “Adequate” in the sense that it identifies conditions which may adversely affect safety and health …
- . . . that a reasonably prudent competent examiner would identify during the examination
- A “Reasonably Prudent Person” … should be able to recognize a hazard warranting corrective action
- “Adequate” found to be a consistent concept in Commission case law, and “repeatedly applied to broadly worded standards
Impact of Sunbelt Rentals??

- The **Sunbelt Rentals** decision broadened the scope of the examination – now the examination must be “adequate”

- The Commission also held that multiple operators (mine production operator and its contractors) can be cited for failing to perform adequate working place examinations or the same violation – dual citation theory – see *Twentymile Coal* (USCA 2006)

- The Commission dismissed Sunbelt’s “fair notice” arguments (that it did not have fair notice that it could be cited for an “inadequate” examination)
  - FMSHRC held Sunbelt had fair notice through the longstanding “reasonably prudent person” test
What is the Reasonably Prudent Person Test??

• Sunbelt Rentals decision restated the Reasonably Prudent Person Test:

  ▪ “An alleged violation is appropriately measured against whether a reasonably prudent person,

  ▪ …familiar with the factual circumstances surrounding the allegedly hazardous condition,

  ▪ … including any facts particular to the mining industry,

  ▪ …would recognize a hazard warranting correction within the purview of the applicable standard.”
Part 46 Task Training - RTLB

▪ “You must provide any miner who is reassigned to a new task in which he or she has no previous work experience with training in the health and safety aspects of the task to be assigned, including the safe work procedures of such task, information about the physical and health hazards of chemicals in the miner's work area, the protective measures a miner can take against these hazards, and the contents of the mine's HazCom program. This training must be provided before the miner performs the new task.” 46.7(a)

▪ Training given by competent person designated by operator (not MSHA certified)

▪ Inspectors trained to observe the work habits and operation of miners for any abnormal activities, and to ensure equipment inspectors and workplace examiners are trained and competent.

➢ Part 46 Toolkit specifically lists “inspector/preshifter” among list of tasks covered!!!
Part 48 Task Training

- “Miners assigned to new work tasks as mobile equipment operators, drilling machine operators, haulage and conveyor systems operators, roof and ground control machine operators, and those in blasting operations shall not perform new work tasks in these categories until training prescribed in [48.7(a) and (b)] has been completed.”
  - Covers miners assigned to a task with no previous experience and also must be repeated when miner has not performed the work tasks within 12 months preceding assignment
- Training program must include: health & safety aspects and safe operating procedures for work tasks, equipment and machinery; supervised practice during nonproduction; supervised operation during production; and training on new or modified machines and equipment.
- Must include HazCom training on chemicals in work area and precautions
- All training and supervised practice and operation shall be given by a qualified trainer or a supervisor experienced in the assigned tasks, or other person experienced in the assigned tasks
Tips for Effective Task Training

- Evaluate miners’ skills needed to perform tasks safely:
  - Allow adequate time for task training
  - Ensure miner’s ability to demonstrate knowledge of company and MSHA procedures applicable to task
  - Task train in non-production setting and in production mode
  - Be sure to cover hazard communication and review SDSs for chemical products
  - Ensure knowledge of required maintenance and service of equipment
  - Cover pre/post op checks of equipment
  - Train on how and where to report problems and malfunctions
  - Have trainee demonstrate safe operating procedures and start up/shut down of equipment
  - Include proper procedure to address any change to the equipment, process or condition
“Train the Task Trainer” Tips

- Establish guidelines for trainers (and remember they are “agents of management” in MSHA’s eyes, targets for possible 110c investigation)
- Utilize checklists, JSA, manuals and SOPs
- Task trainers MUST have been trained themselves and have the necessary skills to perform adequate and efficient task training
- Task trainers should provide the same training on all equipment and job duties
- Evaluation procedures are critical to determine that all health and safety aspects of tasks are addressed in a correct and consistent manner
- Trainer should conduct follow up evaluation of task training and implement any training necessary to address changes to equipment, process or condition
Workplace Examination Take-aways

- MSHA old rule as implemented by Program Policy Letter P15-IV-01 (July 22, 2015) is in effect now.

- Current rule does **not** require documenting the safety hazards discovered during a WPE, but it is “best practice” to document a description of the hazards, and to “alert others” of hazards.

- MSHA PPL alerts mine operators that task training will be scrutinized, and violations may be issued for failing to adequately task train the examiner/competent person, or for an inadequate training plan.

- *Sunbelt Rental*: FMSHRC requires an ADEQUATE exam; applies “reasonably prudent person test”

- **FINAL RULE** expands the current examination requirements, takes effect 6/2/2018 unless further delay.
QUESTIONS???

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